United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1118

To be argued by
DAVID W. McCARTHY
JOEL A. BRENNER
(40 Minutes)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO: 76-1118

B
P/S

- -X

UNITED STATES OF AMERICA,

Appellee,

-against-

JEROME MACKEY, et al.,

Defendant-Appellant

WILLIAM NELSON,

Appellant.

- -X

BRIEF FOR APPELLANT WILLIAM NELSON

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CASES PRESENTED

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PRELIMINARY STATEMENT

Indictment 75 CR 468 charged Jerome Mackey, Richard E. Taylor, and William Nelson with 21 counts of violations of 18 U.S.C. §1341 and §2. Specifically, it was alleged that the defendants did "knowingly and wilfully devise and intend to devise a scheme and artifice to defraud prospective stereo tape distributors and to obtain money from these distributors by means of false and fraudulent pretenses, representations, and promises...". Furthermore, it was alleged that the defendants caused their advertising agents to mail advertisements for the purpose of executing the scheme and artifice. Count 13 of the indictment was dismissed upon

motion of the Assistant United States Attorney at the beginning of the trial. (46)*

After trial in the Eastern District of New York before District Judge Jack B. Weinstein, with a jury, appellant was found guilty of counts one through fifteen (of course, excluding thirteen) and acquitted of counts sixteen through twenty-one. On February 20, 1976, the appellant was sentenced to five years imprisonment, on each count, pursuant to Title 18 U.S.C. §3651; the appellant was directed to serve six months and execution of the remaining four and a half years was suspended and probation for that period was directed. Sentence upon each count was to be served concurrently.

Appellant was continued on bail pending appeal. On February 25, 1976, notice of appeal was duly filed, and David W. McCarthy, Esq., who had been assigned pursuant to the Criminal Justice Act in the District Court was continued as counsel on appeal.

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* Numbers in parenthesis refer to the page numbers of the minutes of the trial.

UNITED STATES COURT OF APPEALS
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STATEMENT OF FACTS

When William Nelson was offered the opportunity, in early 1972, to travel with R.E. "Gene" Taylor while Mr. Taylor was selling eight track stereo tape distributorship, he accepted. It would have been better had he not. For, the Government contended, that brief sojourn blossomed into a full-time business, called Mackey Distributors, Inc., the corporate purpose of which was to sell eight track stereo tape distributorships, and which eventually, provided the mechanism for defrauding many prospective distributors.

Mackey Distributors Inc.*

In the spring of 1972, Gene Taylor was selling distributorships for Diversified Distributors (229).

*Hereinafter referred to as MDI.

He met the appellant, whom he had known for a few years, realized he was unemployed and offered to have appellant accompany him while he attempted to sell distributorships. Appellant agreed and concluded that selling distributorships was a good business. (232). Taylor was selling duplicate tapes and the distributors were receiving them. Taylor's suggestion that they contact his uncle, Jerome Mackey, a reputable and successful businessman was adopted (233).

In late March, or early April, Taylor, Mackey, and appellant met and discussed the stereo tape business. The business consisted of soliciting potential distributors who would purchase cabinets and tapes. A purchaser would be required to purchase at least ten cabinets, containing 40 tapes. The cabinets would be located in various locations with numerous customers like supermarkets and drug stores, where they would be likely to be sold. The distributor would make a dollar profit as would the store, and MDI would profit from the ultimate reorder of replacement tapes. Recognizing that misleading sales representations created problems, Taylor maintained that the company fairly represent the type of tapes that would be supplied-"just tell people just what they were getting into." (237)

Mr. Mackey arranged for the incorporation of MDI and a firm account was opened by William Bellarista, Mr. Mackey's banker at Mr. Mackey's behest (243). Thereafter Mr. Nelson called

Mr. Taylor and informed him, that after an investigation, Mr. Mackey had agreed to participate in the company (238). Taylor testified the company was to be a wholly owned subsidiary of Jerome Mackey Judo, Inc.,* a publicly held corporation and he, Mackey and Nelson would share the profits equally (245, 368). Mackey was to be president and sign checks while Taylor, named Vice President, who was the only person of the three familiar with the tape business, would operate the company.** Additionally Taylor would be a salesman as would Nelson. They were, in fact, the total sales force until mid August (241, 261). It was agreed that duplicate tapes*** would be represented as being the type of

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*Edith Ciro also testified that she had been told by Lester Fisher that it was a wholly owned subsidiary of Jerome Mackey Judo, Inc. (768)

**Taylor, in fact, had to operate the business. While he had prior experience and knew the persons to hire and the salesmen and the materials they needed, Nelson and Mackey did not. They knew no locaters, tape distributors, salesmen, or tape or cabinet suppliers (472). In fact, Nelson did not hire or instruct salesmen, hire locaters, (472-3), or order tapes and cabinets (474).

***Duplicate tapes, synonomous with the more sinister-sounding "bootleg" tapes were recordings made from a copy of the original recording and were of slightly inferior quality (230). Cutouts were original songs which had been removed or "cut out" of the manufacturer's catalogue because they were no longer selling well or were of a seasonal nature (274). A small almost imperceptible hole punched in the tape identified it as a "cutout". In fact, a cutout may never have been popular, may have been popular ten or fifteen years ago or as recently as ten or fifteen weeks before being removed from the catalogues. Some might be sold but it was not a "volume" business (554, 749).

tape sold and the distributors would receive them (236).

April to Mid August

From early April to mid August 1972, sales were limited to the New York area. During this period, distributors were receiving the represented merchandise and as Mr. Taylor said, the operation was legitimate (373). Indeed, the Government presented no dissatisfied distributor who had purchased his franchise during this time.

However, sometime in July or early August, Mr. Taylor testified, he realized the company was experiencing diminished sales and consequent difficulty in paying company obligations (266, 268). This statement, acknowledged Mr. Taylor, was somewhat inaccurate, as the checking account bank statement revealed healthy deposits of $40,023* during July (440). Lester Fisher's recollection was that Taylor had said that business had been good (644). Fortuitously, at this time, Lester Fisher, a former associate and friend at Economy Distributors called Taylor, expressed his disenchantment with his employment at Economy and offered to transfer to MDI and bring three of his salesmen with him (269

These developments caused Taylor to discuss with Mackey the unfortunate plight of MDI (267). At Mackey's apartment, he posed three alternatives: terminate the business, arrange additional financing or assure additional sales (270). This last alternative could be achieved if the services of a friend of his, Lester Fisher could be secured inasmuch as Fisher was an excellent salesman. (271) In relating Fisher's background, including his reputation as an effective salesman, Taylor mentioned a flaw: Fisher might misrepresent (271, 278). Furthermore, Fisher wanted to sell major label tapes to prospective distributors, and Taylor

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*Deposits had increased steadily. In May-$22,380; June-$25,688; July-$40,023 (440).

said he would be able to provide major label tapes called "cutouts" at an increased price (274). Additionally, he thought he would be able to control Fisher. With this last understanding Mackey agreed that they hire Fisher (275). Nelson was definitely not at this meeting nor was there any testimony that he was informed regarding the substance of it, or that his concurrence was sought (275, 277, 279). In any event, neither Taylor nor Mackey agreed to "condone" any misrepresentations.*

At this meeting accord was reached regarding the following modifications of the sales technique: there would be a nationwide advertising campaign, the salesmen would be instructed to sell major label tapes, Taylor would handle any complaints and

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*In a admonition by the Judge prior to the luncheon recess, the Assistant United States Attorney was told:

> THE COURT: All right, gentlemen, we will continue this afternoon.
>
> Now, you understand that the Government has a problem here of tying in both defendants and you don't seem to me to be getting precise testimony from this witness, whether it is not there or you can't get it. I don't know, but I assume that you will be precise in your questions and I don't want this kind of leading this afternoon.
>
> If you have to develop these things--these are critical periods and I want to know what happened there and I am sure that the jury does and if you can't come in with much more than this, you are not going to go to the jury.
>
> So be precise and do not lead.

During the luncheon recess, Taylor's recollection was considerably altered as he then testified that both he and Mackey agreed that major label tapes would be offered for distribution and cutouts and duplicates would be delivered (295).

the cost of each cabinet would be raised to $237.50 to cover the increased expenses (276, 280, 287).

In mid August, therefore, Fisher was engaged by Taylor. Fisher negotiated an agreement regarding his compensation with little apparent resistance from Taylor, that would put many highly paid professional athletes to shame. He not only received a twenty-five per cent commission on his sales, (20 per cent was the commission for all other salesmen), but a five per cent "override" or additional commission above the usual 20 per cent to the average salesman, for each of the salesmen on the staff, including Nelson (287, 290, 294). Extraordinarily, unlike all the other salesmen, including Nelson, all of Fisher's out of town expenses were to be paid by MDI (287-290).

Fisher's arrival signalled a metamorphosis at MDI. Named by Taylor as the National Sales Manager, Fisher was provided with the office in 175 Fulton Avenue, Hempstead, which had been Mr. Nelson's (721). Presently, Nelson was sent to Manhattan (722). Taylor became a signator of the checkbook and commenced signing the checks. The checkbook was retained by Edith Ciro at MDI headquarters (294, 312-315, 396). Although before Fisher's arrival, they had not advertised major label tapes in their ads, they now did so. Mr. Nelson was shown the new advertisement and told by Taylor, who had approved it: "This is the

ad copy that we are going to be using from this point forward". (295, 299) A "singer's"* list was provided for distribution with advertising material provided by Fisher and prepared by Taylor (304, 395). Included in this list were Fisher's wife (named therein as "Rachel Green") and the wife of a locater (305) Linda Barclay, who had purchased a distributorship from Fisher while he was at Economy (305). Fisher brought three salesmen with him--Joyce, Porter, and Schwartz, and also hired Sizenmore, Val Williams, Taylor's son Richard and his brother James Taylor (293, 588). The financial statement of Jerome Mackey Judo, Inc. (hereinafter "Judo") was provided to the prospective buyer's to substantiate the stability of MDI (300). At no time was there any testimony that Nelson's opinion or concurrence was sought a received regarding these changes. Rather, immediately, Nelson ceased selling on Long Island; instead, Taylor ordered him to Manhattan and then to sell on the road (315, 386).

These modifications eventually wrought havoc with MDI. Commencing in September of 1972, complaints (or "heat") were starting to be received. Apparently, the main complaint was that the distributors were receiving duplicate rather than major label tapes (320).

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* "Singers" were persons, represented to be satisfied and successful distributors who were used as references.

As the "heat" man,* Taylor tried to convince the distributors to take the duplicates or satisfy the customers until the requisite material would be delivered (276, 321). Failing that, he would fabricate excuses to account for any deficiency e.g. the absence of locaters (323). Although he testified he discussed the "heat" with Mackey, he never did with Nelson (323, 234-5).

Taylor's outside interests

When Lester Fisher entered MDI, Taylor was presented with the springboard for his personal corporate diversification program. Contending that Mackey was not in the office enough, Taylor became a signator to the checkbook which was retained by Edith Ciro, MDI's secretary at Fulton Street. He signed the checks which Edith Ciro prepared at his direction (396). At other times she would sign with his authorization (407).

Shortly after Fisher's employment, Taylor formed B & G Sales, a trade style, which he testified was owned by him alone (431)**. The purpose of B & G was to sell tapes to MDI customers. To that end, Taylor sent a letter, defendant's exhibit G, dated September 22, to MDI distributors informing them that B & G would

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*Initially Taylor testified he was designated the "heat" man (280, 285, 485). However, he also testified that he considered himself the heat man and that he had not been designated the "heat man" as there was no heat at the time of Mackey and Taylor's conversation in July at which, he had previously testified, the designation had been made. (321, 393)

**Later Dallas McCoy (1266-7) and Robert McGovern (1307) testified that each was told by Taylor that he was Taylor's partner in B & G.

be their sole source of reordered tapes (App. p.A39) (433, 438). Although he acknowledged that there were only two sources of income for MDI-distributor sales and tape reorders, and the formation of B & G would exclude the latter, Taylor testified Mackey consented to its formation (456, 458). However, MDI had no interest whatsoever in B & G, and the only other person with an interest was Dallas McCoy who was to provide the tapes to B & G (433).

Indeed, the only persons who would benefit from its formation were Taylor and McCoy (433). McCoy never sold directly to MDI* but "furnished" the tapes to Taylor who sold them through B & G (432). Taylor further testified that he did not know how much he had made from B & G, as they had kept no books or records (435). Nor did he know whether any tapes went to non-MDI customers (432).

In late September, subsequent to formation of B & G, Taylor found MTM (416, 417, 476). This corporation was composed of McCoy, Taylor, and McGovern** (346). The purpose of this corporation also was to sell tapes to MDI distributors with McCoy as the source of tapes (346). No money was placed in the

*Shortly before this testimony, he testified McCoy provided tapes to MDI and MTM (431).

**Remarkably, Edith Ciro did not know what MTM was, but she only signed checks to MTM on behalf of Taylor (841, 859).

corporation by either McGovern, McCoy, or Taylor (415, 416, 417). Instead, the tapes which formed the stock in trade of the corporation were purchased by Taylor on credit from friends (416). Although MTM made no profit as the tapes were sold at cost plus freight (422) it did sell tapes to MDI at a profit (425). The apparent reason that no funding was necessary for MTM's* formation was that equipment and resources of MDI were used for MTM's benefit (428, 434, 345, 425). For example, defendants exhibit H were checks to cash signed by Edith Ciro for Taylor containing a notation that they were for LaRocca and McGovern who were absolutely not employees for MDI at the time of the check and who were "warehousemen" for MTM (433-4). Taylor could not explain why this check was written (445). Furthermore, the warehouse where McGovern was located was leased and paid for by MDI (452, 478, 1281). This misuse by Taylor of MDI facilities, of course, was not new as Defendants exhibit G reveals. The phone number to place orders from B & G is the MDI phone number.

In any event, Taylor was unable to state how much money went to MTM Sales Corp. from MDI as MTM had no records (421). But payment for tapes purchased from B & G or MTM was not deposited

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*Fisher testified that he never heard of MTM (despite being Taylor's friend) until the Assistant United States Attorney mentioned it (707).

to MDI (461)*. Initially, Taylor testified that MDI had only one checkbook (398). However, upon viewing the check submitted by the defense, he concluded that there must have been more than one checkbook (413). Indeed it was agreed that there were two different checking accounts.** Defendants' exhibit E, for example, contained two checks drawn on the West Hempstead branch reflecting a different account number than on the resolution (00501384) (411, 874). The account number on the resolution was the number on the checks from three different branches other than the West Hempstead Branch (409)***. Interestingly, certain checks drawn on

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*This was, as Mr. Dallas McCoy learned to his chagrin at trial, the truth. All payments to B & G Sales were to be sent by Taylor to McCoy for deposit in the B & G Sales account in Chesterfield, Missouri. Defendants' V, three checks with B & G Sales as payee had never been seen by McCoy. The three totalled $5250 and were cashed in a bank in Boulder City, Colorado, fortuitously, Gene Taylor's bank (1272-1275). Although all three checks contained in Defendants' V were drawn on the MTM account, Taylor had testified that he could not remember whether he had received any check from MTM for B & G. (479) In fact, he denied that MTM purchased tapes from B & G (478).

**Some confusion arose because there were basically four different account numbers. It was ascertained that one of the accounts was the normal successor to another account (937, 1030) but the West Hempstead account, not reflected on the corporate resolution (Government's 20 A) was opened by Taylor (410).

***The MDI account number in the corporate resolution was 096-00-42-7.

the MDI account with MTM as payee were cashed without endorsement (Defendant's C). Also Defendants' F to MTM had no endorsement (418, 419).

Although cross examination was designed to elicit an admission that Taylor had mulct MDI, elusion and a convenient memory thwarted an explicit concession to that effect. It was not until the Assistant United States Attorney belatedly relinquished Government's Exhibit 15 H that evidence establishing Taylor's intent to siphon money from MDI by creating spin-off companies to sell tapes was finally unequivocally adduced (1057).

LESTER HARDY FISHER

Mr. Fisher* was the National Market Director of MDI in 1972 (551). In return for his testimony, he had received a promise of immunity** from prosecution for himself and his wife (552). He had previously pleaded guilty to a reduced charge of fraud in North Carolina (628). Prior to joining MDI he had sold tape distributorship for Economy Distributors of Atlanta, Georgia, where duplicate cutout tapes were delivered to customers although major label tapes were offered for sale or "pitched" (553). In recalling his experience at Economy, he noted that for the first six mont

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*Mr. Fisher was characterized by Taylor as a congenital liar (271).

**Fisher testified that he was told by the Assistant United States Attorney: "...that if I cooperated and told him the truth that I would not be prosecuted for anything that I had done at Mackey Distributing or anything that I told him about". (732) However, when asked upon cross-examination whether he had filed income tax returns and whether he had paid taxes, the Trial Judge permitted his refusal to answer (726-728).

employment there, he did not know the distributors were not getting major label tapes (563).

In July, Fisher decided to leave Economy because Grandpa O'Hara, the owner, had not paid him. He telephoned Taylor in New York and told him he was willing to work for MDI (562). He met with Taylor* and agreed that he would receive 25% commission on his own sales, 5% "override" on those of the salesmen and out-of-town expense (567). They discussed that major labels were to be advertised and offered for sale and the literature to be used was the same as at Economy (574). He further required an ironclad "buy-back" agreement, although the substance of the agreement was undiscussed (583). However, they did not discuss the previous representation or sales pitch or sales technique** which had been conducted at MDI (646).

Later, the sales pitch, offering major labels was presented to the salesmen including Nelson (589). Significantly, the salesmen were not told that the representation were false, so that they would be better able to sell the prospective customers (746). Moreover, Taylor had told the saleman that professional locaters would be forthcoming (244, 600). Nelson did not ask any question

*He testified that he could not remember Nelson being there, but he might have been present (566). Taylor, on the other hand, did not testify to any personal meeting as Fisher did. Instead there were two phone calls. One from Fisher to Taylor requesting to join the company and the second from Taylor to Fisher announcing him employment (269, 291).

**Fisher's own sales technique was sale by innuendo. He let prospective distributors draw their own conclusion rather than explicitly stating that they were going to receive specific merchandise, e.g. he did not tell people they would receive major label tapes (733-735). Fisher believed his selling capability to be not inconsiderable- he could sell anything (736).

but went to work in New York, at 501 Fifth Avenue (721, 572). Nelson had been forced out of the office because Fisher could not work with him (722). In fact, there was a personality clash as there was between Nelson and Taylor (722, 595).

Nelson was not in the office frequently, in fact, he took a vacation after the first advertisements were placed in the newspapers (721). Indeed between starting in August and September 12, Fisher saw Nelson in the office perhaps six or seven times (723).

Approximately September 15, or 20, at Taylor's suggestion a new office was opened in Chicago--manned by Fisher (309, 598-90). Meanwhile, Nelson was selling in Wisconsin and Taylor was to send out locaters within 30 days (600). Taylor also submitted the ads and arranged for the tape distribution (600). All of his financial arrangements were with Taylor, to whom he always reported (709, 655). Furthermore, his exceptional position with MDI including his paid expenses in Chicago permitted him to live a rather lavish life, including a month at the Playboy Club.* And this agreement had been concluded only with Taylor: it had not been discussed with either Macky or Nelson (679-680). He never knew how much expense money had been expended for his accomodations as the bill was returned to MDI pursuant to a letter of credit signed by Taylor (699, 605). Taylor and his wife visited Chicago and charged their

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* Fisher was placed in this extravagant hotel by Taylor (710)

expenses as well

In August and September, business was good and there were very few complaints (684). Between November 15 and 21, Taylor told Fisher that MDI needed money (705). Fisher simply did not believe Taylor because he knew that money was streaming into MDI (607, 705). Unexpectedly, Fisher became the heat man in Chicago (698). This was surprising because he believed that he was entering a legitimate operation (based upon his early conversations with Taylor, before going to Chicago), and because he believed that distributors would receive deliveries (554, 704, 737). In fact, it was his opinion that if major label tapes had been provided, MDI would still be operating (737).

As time went on, the complaints increased, but Fisher, who returned from Chicago around October 5, did not remember whether there were any then (702). Even in November, his second trip, the "heat" was described as a "little hot". (685). However, just before December 1, he came to New York to present his plan for a vending machine to sell tapes. Taylor said he would ask Mackey for $50,000 to fund it (610). Fisher met with Mackey and Taylor only and explained the machine, and its cost (611, 611 a); Mackey said he would let them know the next day. He met Taylor the following day at McGovern's warehouse, where Taylor announced his resignation from the company (613). Taylor and he drove to the airport. Fisher returned to Chicago, where four to five days later he received a call from Nelson asking him to return to New York to tell what

had transpired at MDI. He was also requested to join Neltay, the superceding corporation from which profits would be used to fill the back orders of MDI. Despite a second call with a similar request, Nelson's refusal to provide him with a roundtrip ticket precipitated Fisher's declination to cooperate or return (619).

EDITH CIRO

She was the secretary for MDI, having been hired by Taylor who she remembered as administering the managerial responsibilities of the company, including ordering all tapes* and cabinets and approving all contracts (753). Although initially she did not remember signing any checks and denied authorization from Taylor to do so, upon seeing various checks she remembered that she did sign Taylor's name on occasions (765). She had the checkbook and would prepare checks to be signed by Taylor including checks to B & G and to Robert McGovern as B & G (805, 859, 876). As she only had two checkbooks, one to be used upon the exhaustion of the checks of the other, the only account she knew was numbered 09600427 (Defendants' exhibit C-Number 103). (817, 847, 873). She did not remember seeing defendant's exhibit E, account number 00501 384, nor recognize it as an account number for MDI. (808, 847, 874) In any event, Taylor never told her that a separate account had been prepared for MDI (873).

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*She saw no orders for major label tapes (550)

During her tenure at MDI, Ciro observed locaters there, including the chief locater, Art Webber (756). Fisher, Taylor's friend was also present, but she did not see Nelson exercise any control of administering the office (757). Taylor would not discuss with her what Nelson was doing, in fact she was unaware that he was selling (861). Indeed, from time to time he would be absent for an extended period-for a week or two at a time from August to December (860). No one even telephoned asking for Nelson (774).

Toward the end of September complaints regarding the tapes and cabinet location started (771). Taylor instructed Ciro to inform the callers that he was not in (774). And when she asked him whether he was going to satisfy the complaints, Taylor said that he did not have the money to buy the tapes and it was "too bad". (773, 776, 841, 842) At this juncture, Taylor was stalling (773). Simultaneously, Ciro was having difficulty balancing the checkbook. Of necessity, she called Mr. Bellarista approximately every three weeks at Franklin National Bank for the balance in order to reconcile the checkbook with the correct balance (788, 805, 806, 870). Interestingly, one time Taylor asked Ciro how she knew what the ultimate balance in the checkbook was and she explained her habit of calling Mr. Bellarista (870).

When checks were received from prospective distributors, she would remove them from the envelope, attach them thereto with a paper clip and bring them to Taylor (871). A record of the

checks received would only be made after the check had been returned to her by Taylor (872).

Toward the end of October, the complaints increased until they became heavy in November (807). But she did not tell either Mackey or Nelson that anything seemed wrong (810). Even at this point, Taylor was still controlling the office (807). However, on December 1, she typed Taylor's resignation as he stated he wanted to leave to avoid being the patsy. (808, 855)* At his direction, she also prepared and gave Taylor a $1000 or $2000 check before he left (738).

On the same day, Mackey and Nelson went to the MDI office and received the resignation, regarding which one, later identified as Nelson, stated, "he skipped". (784, 812). Thereafter, Mackey asked Ciro to conduct a preliminary audit (785, 809). Mackey and Nelson were trying to determine what had happened with the company, and they suspended operating until the audit was complete (829, 855, 864). After her audit was completed (Government's 41 B), and Mackey's accountants audited the books themselves (786, 864. Nelson said that everyone in the company would have to "buckle" down. Computations based on the one checkbook which she had, revealed that of approximately $300,000, $55,000 was missing (789, 813, 875). A portion of this deficiency is attributable to the dis-

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*Taylor had testified that the resignation was typed by his wife and mailed to MDI (344).

proportionate expenditure for tapes. While an approximation of the cost of the tapes which had been supplied to the distributors amounted to an expenditure of $35,000, nearly $100,000 had been paid, according to the audit (889-891). Simply stated, it appeared that more tapes were ordered than necessary (813). Following December 1, Neltay* was formed, using the same offices, telephone number, and stationery as MDI (867). Nelson was operating the office and controlling the money (822, 852). She was not close with Nelson and was not informed of what he was doing, although he was on the phone with distributors, and she remembered him trying to buy tapes (826, 252, 853). This was in distinct contrast to the period preceding December 1, when, as she stated, Nelson did not direct her to prepare checks nor did she remember him signing any (859, 860).**

WILLIAM BELLARISTA

William Bellarista testified that either Jerry Mackey or an employee opened the account at Franklin National Bank for MDI (903). Although originally opened in the Bronx, in November the account was switched to Park Avenue (910). This account was the only one of which he was cognizant (983). Prior to trial Mr. Bellarista was unaware that account number 005013842, reflected in

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*She first heard the name "Neltay" from Taylor (867).

**Fisher also testified he could not remember Nelson signing any checks (723).

Defendants' exhibit E, existed (1009). This account apparently existed simultaneously with account 09600032-8, the account named in the MDI corporate resolution (983, 1009). Indeed, it was agreed between the Government and the defense that there were two separate accounts, as Mr. Bellarista himself testified (986, 1014).

Perusal of the MDI banking statement revealed that from April 21, 1972, to June 31, 1972, $90,000 was deposited (945). For the three months from September 1 to December 8 of that year, $123,000 was deposited (946-7). Reference to the Neltay account statement, Government's exhibit 22 reflects that all monies deposited to Neltay account were deposited between December 11 and December 28 and that the total was $33,192 (955).

The representative from F and N advertising agency which placed the advertisements for MDI was ALAN NELSON. (1110) Initially, all the advertising was ordered by Taylor and was of a local nature - New York City and Long Island (1111, 1134). The advertisements would be placed with the newspapers by mail (1111). However, the ads could be placed by phone both locally and nationally, and he could not testify from personal knowledge that the advertisement proffered at trial had been mailed (1110, 1124).

There came a time when Fisher began directing the advertising and the "out-of-town" advertising commenced (1118, 1136). It was not until Fisher departed that he first spoke with Bill Nelson (1133). He approached Nelson regarding the outstanding

balance owed F and N by MDI. Bill Nelson stated that as soon as he could improve the condition of the company, locate the money which had been in the company and decide how he would conduct the affairs of the company, he would pay him (1136-1137).

THE PROSPECTIVE DISTRIBUTORS

As was recognized by the defense during trial, it must be conceded that persons who had paid substantial sums of money between $2000 and $10,000 had not received services or items for which they contracted. Some did not see a locater, others did not receive cabinets or tapes, others received duplicate rather than major label tapes, and still others received nothing.

In most instances, as their frustration mounted at the non-fulfillment or partial fulfillment of the contracts, they spoke to no one but Edith Ciro at MDI. Consistently, their first substantive contact would be with Bill Nelson, usually at a time when their patience had been exhausted, and always after December 1 (140, 166, 185, 217, 1170, 1203, 1225, 1234, 1238). Often, the call would be instituted by the distributor, but on other occasions Mr. Nelson would call them (140, 153, 1226). When spoken to in December, and in some instances later, Mr. Nelson would recite the poor financial condition of MDI-mentioning the figure $300,000. Some distributors would remember him saying that Taylor had absconded with the money, others would remember that figure but not an accusation that Taylor had stolen the entire amount (146, 210, 1079, 1092, 1171-2, 1195, 1198, 1225, 1235, 1243).

In all cases, however, Nelson expressed an intention to fulfill the outstanding contracts by making every effort to obtain cabinets and tapes where appropriate (148, 155, 166, 184, 209, 523, 1094, 1227). Some distributors, in January or February 1973 were told of company owned distributorships in rural Kansas. Nelson often instituted this call, asking whether the distiibutor would be interested in it, but he did not say it was owned by MDI (142, 1216). At no time was there a request for more money (154, 1095). In some cases, an attempt, however, inadequate, was made to provide some part of the merchandise ordered (168, 514 a, 1087, 1197). Upon the conclusion of the testimony of WILLIAM MELLODY, one of the distributors, the Government rested. Counsel's motion for dismissal and direct verdict of acquittal was denied (1246-1253).

DEFENSE CASE

In addition to witness called on behalf of the defendants, the following stipulations were concluded between the Government and the defense:

a) "It has been stipulated that on December 6th, 1972, the two defendants went to the District Attorney of Nassau County and did complain about Mr. Taylor." (1264)

b) "The stipulation is that Mr. William Chambers of Oklahoma, if he were called to testify, he would testify that Mr. Nelson's reputation both privately and professionally in the community is that of being truthful and honest and that Mr. Nelson did

not sell a distributorship to Mr. Chambers." (1369)

DALLAS MCCOY

Dallas McCoy was able to make a profit from the distributorship he had purchased from Taylor to sell duplicate tapes (1265-6). Subsequently, he spoke with Taylor who told him that MDI was selling "major label tapes", which included "cutouts" and currently popular tapes. Taylor stated that both he and McCoy recognized that those tapes would not sell and that the two of them would provide saleable tapes. Taylor stated, "If you will buy the tapes -- if you will pay for the tapes that I will order, I will sell them on a re-supply basis to the distributors that we are selling, and then we will split the profits down the middle". (1267) McCoy was to send the tapes to the MDI warehouse in Hempstead (1271).* As time went on, Taylor was not compensating McCoy and told him that MDI was substituting duplicates in the cabinets (1268).

Taylor renegotiated their agreement so that McCoy was paid a minimal rate, precluding a profit; McCoy had to agree so he could cover the checks which had already been written (1268). Taylor sent him checks drawn on MDI and also checks from individual distributors, endorsed by Taylor (1269). When some of the checks

*Taylor had testified that he did not know if any tapes had been shipped to the MTM warehouse by McCoy, as the MTM warehouse was the MDI warehouse, Taylor could not recall where McCoy's numerous tapes had been sent (478-9).

bounced, McCoy had to borrow money to compensate the bank for the previous checks which had been honored, and he was unable to send any more tapes. At that time, Taylor owed him between $4000 and $4500 which remained unpaid for tapes shipped to Taylor (1271).

Although the original agreement regarding B & G provided that all checks to B & G be sent to McCoy for deposit in the B & G bank account in Chesterfield, Missouri, Defendants' exhibit V had been deposited in the Boulder Bank and Trust Company, Oklahoma, Taylor's bank (1273). The checks were drawn on MTM Sales Company, totalled $5250, and were never seen by McCoy before the trial (1275).

The second witness for the defense, like McCoy, had been a distributor; unlike McCoy, ROBERT McGOVERN had lost a substantial financial setback (1278). Taylor told him that a position as warehouseman was available and McGovern became the warehouse supervisor at 16 Columbia Street, Hempstead (1280, 1289). When the warehouse was being furbished, MDI paid for the shelving and supplies (1281).

Assisted by John LaRocca, McGovern would fill requests for tapes as solicited by individual customers and submit order forms to Edith Ciro for additional tapes (1282). They were supplying reproductions, but not duplicates (1285). The complaints of which he was aware were that the distributors were not getting enough tapes. Although he would order tapes, they would not arrive and Taylor would explain that they were on order (1285, 1287).

Sometime later, contending that the appropriate tapes would not be obtained through MDI, Taylor informed McGovern that they would order and supply the tapes through a new corporation - MTM, of which the principals were McGovern*, Taylor and Gil Drugin (1287-8). He was not told that McCoy was a principal (1296). This new corporation operated from the MDI warehouse at 16 W. Columbia Street, utilizing the smme facilities, including the telephone and shelving. Taylor drew a salary of $175 and then $200 a week (1290). McGovern was told to order tapes from McCoy, but to write the check to Taylor who stated he would pay McCoy (1291-2). The exchange, at least in one instance, seemed never to have been completed.** McGovern had given a check to Taylor for McCoy, but later McCoy telephoned, asserting he had not been paid (1293).

In Decmeber, Taylor said he was going to Oklahoma to discuss tapes and he would communicate with McGovern, but, in the meantime, he was to continue sending pay ehecks to him (1294)***. As it happened, McGovern had to borrow money to keep MTM functioning, resulting in a substantial financial loss. He testified that he lost $25,000 including the $80,000 for the distributorship (1321).

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* Taylor told him he was a partner in B & G as well (1307).

** Taylor stated he could not remember receiving a check from McGovern in return for tapes which had been shipped to B & G by McCoy (479).

*** Taylor admitted that when he left MDI, he continued selling 8 tract tape distributorships (484).

To compound the injury, Taylor, in 1973 requested $2,000 from McGovern in return for which McGovern would be placed on a "singer's" list. He sent the money and heard nothing more (1314).

After Taylor's departure, Mackey called a meeting of McGovern, Drubin, Nelson, and himself (1307). Mackey stated that $50,000 was missing and he inquired whether anyone knew about it (1308, 1315). Receiving a negative response, Mackey asked whether McGovern would be interested in investing $20,000-$30,000 to fulfill outstanding contracts (1313).

Nelson also was trying to fulfill the contracts of MDI. He placed orders in January, 1973, with MTM for tapes provided by McGovern to supply distributors (1322). On one occasion, Nelson expended $5,000 for four-track tapes believing he was to receive eight-track tapes (1296, 1324, 1326-7). When the boxes containing the tapes were opened and the four-track tapes were observed, Nelson flushed (1327).

JOHN DUDLEY MERRITT

John Dudley Merritt owned the Squire Grill where he saw Taylor every day of the week as long as MDI was in business. He was an excelled customer, expending $25-$60 daily (1359-60). He also saw Fisher who spent approximately the same (1360). He was present when, in answer to his partner's questions, Fisher admitted that he was a "flim-flam man" and Taylor stated that once he had obtained his money he was going to abscond from MDI.

The defense rested.

After deliberating for three days, the jury returned a verdict, with respect to Mr. Nelson, of not guilty of counts sixteen through twenty-one and guilty of the remaining counts.

POINT I

THE EVIDENCE AT THE TRIAL WAS INSUFFICIENT TO ESTABLISH APPELLANT'S GUILT BEYOND A REASONABLE DOUBT

Because the Statement of Facts contains an extensive discussion of the evidence at trial, unnecessary repetition will be avoided. But it is noteworthy that two significant facts were proven by the Government's efidence: (1) appellant was never informed either explicitly or inferentially that MDI was to be used to perpetrate a fraud and (2) appellant was never consulted regarding any modifications of MDI's operation or sales technique. The evidence was insufficient to establish that appellant knowingly participated in any scheme with intent to defraud.

In spite of the testimony, for the Government, of the two pivotal culprits in this deception, Taylor and Fisher, no evidence was adduced that Mr. Nelson knew (a) the purpose of MDI was to defraud prospective distributors, (b) the sales pitch was fraudulent or (c) the mails would be used to further any fraud. (See Point , infra) Durland v. United States, 161 U.S. 101, (1896); United States v. Kyle, 257 F. 2d 559 (CA 2, 1958) cert. denied sub. nom.; Gardner v. U.S., 358 U.S. 927 and 358 U.S. 937 U.S. v. Klein, 515 F 2d 751 CA 3 (1975); U.S. v. Houlihan, 332 F 2d 8, 13 (2d Cir), cert denied 379 U.S. 859 (1964).

Taylor, who controlled MDI, and would be the appropriate person to establish Nelson's complicity since he was at the hub of MDI, testified that Nelson's sole function was as a salesman. While the Government contended that Nelson was of equal responsibility in MDI and therefore, must have known what was occurring, the evidence is to the contrary. When the character of MDI changed, upon the arrival of Fisher, from a "legitimate" operation, Nelson was immediately dispatched from Fulton Avenue, and his office occupied by Fisher. Taylor ordered him to Manhattan, then to the Midwest. Since it is apparent that Taylor's plan to mulct MDI (as he admitted to Agent Gray) accelerated at this time, as manifested by the formation of B &G and MTM, Taylor drove Nelson from Fulton Avenue to prevent Nelson from perceiving Taylor's fraudulent machinations. That this was Taylor's modus operandi and purpose is conclusively established by the testimony of Fisher's exile to Chicago again by Taylor. Taylor divested the main office of any persons who could be an impediment to his nefarious plans.

Furthermore, Nelson was not informed of the advent of Fisher, nor was his advice sought concerning the prospective changes. Taylor's testimony regarding the slight alteration of the newspaper advertisement is illustrative. Rather than soliciting his opinion, Taylor presented appellant with a fait accomplice. It is not unusual that Nelson, unfamiliar with the tape business, should not have questioned Taylor. Taylor had been operating the

company, despite Taylor's incredible representations to the contrary, and MDI appeared to be flourishing. It appeared that Taylor was conducting the business successfully and there was no reason to suspect future foul play.

Failing in its attempt to prove direct complicity in the scheme, theGovernment sought to establish knowledge by inference. They contended that Nelson, as a salesman, was cognizant of the fraudulent nature of the "sales pitch". However, there was simply no evidence adduced, either directly or circumstantially to establish this contention. The evidence is to be contrary--neither Taylor nor Fisher told him that any of the representations were untrue. Since MDI had been operating successfully to this and there were few, if any complaints, there was no reason to suspect that the change was for the predatory exploitation of either MDI or, more importantly, the prospective distributors. The change in fact, did not require fraud. Fisher testified that <u>had</u> major tapes been delivered, MDI would still be operating legitimately.

Importantly, Fisher testified that for the first six months at Economy as a neopnyte salesman, he was unaware that contracts were not being properly filled. Moreover, it was uncontested that the salesmen were <u>not</u> told that the distributors would not receive the purchased tapes--in fact, that subject was assiduoulsy avoided so the salesmen would concentrate on their sales.

While the Government contended that Nelson must have known, there is simply no evidence to that effect. Neither Taylor nor Edith Ciro, the two recipients of the complaints informed Nelson. But this is understandable, as Taylor could not conclude his emasculation of MDI if Nelson were made aware of the nonfulfillment of contracts. Indeed, it was at about this time that MTM was formed.

The inquiries by both Nelson and Mackey immediately following Taylor's exit established appellant's lack of knowledge. Edith Ciro, Robert McGovern, Lester Fisher and Art Webber, were asked to explain what had transpired at MDI. Furthermore, Nelson's unsuccessful attempts to fulfill contracts and, in effect, to operate a business with limited knowledge there, are not the acts, inept though they may have been of someone who had previously, knowingly, and intentionally aided in creating the posture in which MDI found itself.

Although it was never established what the elements of a wholly owned corporation were, the evidence concerning this issue caused the jury to request a definition (1645 ff). However, the Government's evidence contradicted any claim of deceit in this representation. Taylor testified that Mackey, Nelson, and he believed MDI to be a wholly owned subsidiary of Judo Inc. Though the three of them, within the tenets of corporate law, might have been mistaken, there is no evidence that their misconception was not honestly entertained. While the Government argued that the note with

James Diamond, prepared by him, indicated to the contrary, the Government's witnesses established the note to be an aberration, without meaning respecting the appellant's conception of MDI's relationship with Judo, Inc. The evidence did not establish appellant's participation in any scheme at the time of the mailings. All the mailings were completed before Taylor left MDI and Nelson allegedly commenced misleading statements.

In United States v. Knippenberg, 502 F 2d 1056 CA 7 (1974) the Court stated:

> [1-3] Although joining a conspiracy subjects the late joiner to some of the consequences of earlier activity by others in furtherance of the conspiracy, and conspiracy principles apply to a multi-member mail fraud scheme, whether or not conspiracy has been formally charged, it is out opinion that an individual "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy..." In the context of use of the mails in execution of a scheme to defraud, it has been said that "The crime consists in the posting of the letters..., and if the defendant was not in the scheme when the letters were posted he was not a principal or an accessory to the crime then committed."

While noting contrary decisions in other circuits, the Court was persuaded by this Court's decision, authored by Learned Hand in Van Riper v. United States, 13 F 2d 961 CA 2d (1926).

As the evidence preceding December 1 does not establish that appellant associated himself with the scheme knowingly and with intent to defraud, the conviction mus be reversed.

POINT II

THE COURT'S REFUSAL TO GRANT AN ADJOURNMENT BEFORE TRIAL DENIED APPELLANT EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR TRIAL AND DUE PROCESS

On Wednesday, September 24, 1975, pursuant to appellant's letter expressing dissatisfaction with his attorney, Judge Weinstein assigned new counsel. That Friday, September 26, prior to marking exhibits, substituted counsel moved for an adjournment of trial which had been previously scheduled for Monday, September 29 (3). The motion was denied. When the motion was repeated because of the many documents involved and substantial investigation that would be required, it was similarly denied (35).

The denial of the adjournment, within the facts of this case constituted a violation of appellant's right to cousel. The record of the trial of this case is replete with glaring illustrations that adequate trial preparation was simply impossible in a case of this complexity. That the documents in this case are copious is simply irrefutable (549, 922). Indeed, the Assistant United States Attorney repeatedly neglected to turn either 3500 material or Brady material over to counsel, because of the voluminous documents. The Grand Jury testimony of James Diamond, a witness for the Government was not presented to the defense until <u>after</u> he had testified (545).

More egregiously, a report of a conversation between Agent Gray and Eugene Taylor, substantiating in major respects the defense theory that he had mulct MDI causing the non-fulfillment of contracts was not distributed until well after Taylor had ceased testifying (922 Minutes of October 3, pp 1-23). The proffered explanation of inadvertence due to the voluminous documents in the case was accepted unesitatingly by the Judge (922, Minutes of October 3, p. 11). The following Monday, additional material, the handwritten notes of Agent Gray, marked as Government's Exhibit 15 A for identification were distributed. (933) The defense was partially founded upon MDI and other checks. Inspection thereof was impeded because many of the originals were missing* and the copies possessed by the Government were blurred.

Even those available were numerous: the Government had three or four envelopes full of checks, but no copies (405). Indeed, well into the case, neither the Government nor the defense had perused the checks to determine how many had been signed by Mackey (657-8). Moreover, confusion reigned as to how many checking accounts existed and where they were located (400, ff). Even after the testimony of William Bellarista, an expert in banking, the Trial Judge found the testimony confusing (1030).

The final insurmountable factor precluding the mounting of a comprehensive defense was the dispersion of possible witnesses

*This was extraordinary as the co-defendant had been provided with a receipt for the cancelled checks and checkbook by the FBI (194).

far and wide.

B and J Fixture, East Point, Georgia, provided cabinets, and Taylor wrote a check to them on December 1. Joe Stevens, of Oklahoma City, Oklahoma had operated Diversified Distributors (see defendants' exhibit Y for identification) but attempts to locate and serve him with a subpoena proved fruitless (1373). Joe Bodin of Hempisphere Sounds and Joe Patrick of Golden Goodies should have been interviewed to establish how much Taylor was siphoning from MDI. Distributors and others should have been interviewed regarding their experiences with MDI. In short, the defendant, de facto, although unintentionally, was prevented from offering additional, relevant witnesses on his behalf. Webb v. Texas 409 U.S. 95 (1972).

In Powell v. Alabama, 287 U.S. 45, 71 (1932) the Supreme Court acknowledged that the constitutional requirement of counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case". And in Avery v. Alabama, 308 U.S. 444 (1940), the Supreme Court re-asserted its prior admonition--but the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the constitution's requirement that an accused be given the assistance of counsel. (at p. 446). See also Chandler v. Fretag, 348 U.S. 3, 10 (1954).

In an uncomplicated and straightforward case, with an apparent and simple defense, five days preparation, as here, would be constitutionally adequate. The voluminous documents and checks, Taylor's carefully camaflouged scheme to deplete MDI's resources and the farflurg nature of Taylor's sources in the tapes business, precluded an expeditious and comprehensive investigation. Were an adjournment granted, the necessity of relying upon the Marshalls office to serve Joe Stevens, an important witness, may have been avoided. Counsel would not have been forced to make a Hobson's choice of delaying the trial, which would irritate the jury, or proceedings, as here, without an important witness.* (1371-1377). Furthermore, the period during trial could not be expended for investigation. Substantial 3500 material was being distributed daily and daily copy required the dedication of substantial time to prepare for the following days cross-examination. United States v. Baum, 482 F 2d 1325 (CA 2, 1973). The unfortunate but inevitable inadequacy of preparation was exploited by the Assistant United States Attorney in his summation. In commenting that the defense had failed to call a successful distributor or any policemen, objection to which was overruled, the government profited

*The importance of Stevens' testimony is that it would have substantiated defendant's theory. At p. 5 of Defendants' Y for identification (report of interview with inspector Gray) the following is recorded:

> "He knew Nelson was related to Jerome Mackey and that he had funded the firm based at least partially on that relationship. From what he was told Taylor isolated Jerome Mackey from the daily operation of MDI and Macky and William Nelson were victimized by Fisher and Taylor."

by the limited time for preparation. It is simply impossible to effectively try a complicated case, untangle complex corporate machinations and interview a hundred distributors, and dozens of other witnesses, all of whom are scattered about the county. The conviction must be reversed. United States ex rel. Davis v. McMann, 386 F 2d 611 (2d Circ. 1967) cert. denied., U.S. , 88 S. Ct. 1045 (1968); People v. Foy, 32 N.Y. 2d 473, 478 (1973).

POINT III

THE JURY'S VERDICT OF GUILT ON COUNTS 1-12 AND 14-15 MUST BE SET ASIDE ON THE GROUND THAT IT IS REPUGNANT TO THE VERDICT OF ACQUITTAL ON COUNTS 16-21 AND ON THE FURTHER GROUND THAT THE ACQUITTAL ON COUNTS 16-21 CONSTITUTES COLLATERAL ESTOPPEL OF A GUILTY VERDICT ON THE OTHER COUNTS

Appellant's position, stated simply, is that the only way the jury could convict him of the "newspaper" counts was if they believed the testimony of Taylor and Fisher that he was aware of and participated in the fraud charged. The problem that this raises, however, is that if they believed this testimony they would also have had to convict on the "check" counts. Since they acquitted on the check counts they could not have believed this testimony, could not have found beyond a reasonable doubt that appellant was a member of the fraud, and could not properly have convicted him of the newspaper counts. That they did so convict gave rise to a repugnant verdict, which must be set aside.

The transcript demonstrates beyond question that the heart of the prosecution's case was proof of knowing use of intentionally fraudulent misrepresentations during the course of a single on-going conspiracy. While there had to

be proof of use of the mails in order to establish federal jurisdiction, it is clear that no real distinction existed or was made among the mailings alleged or proven in this case. Although the mailings from the alleged conspirators (the newspaper advertisements) and the mailings to the alleged conspirators (the checks) were treated separately in the indictment, that is the only place they were so treated. In both the prosecutor's opening and closing statements, in the testimony of all of the witnesses, and in the charge of the court, the mailings were treated as what they actually were--simple jurisdictional elements. In other words, the fact of the mailings was, in effect, conceded; what was not conceded was the knowledge with which they were done.* But, and this is the important fact to be remembered, no distinction was ever made between the newspaper counts and the check counts for this purpose during the trial.

In its opening, the government said that it expected to prove that each distributor saw a newspaper advertisement and mailed in a check (T. 48-50)--all of the counts of the indictment were summarily lumped together as follows:

> "The first thirteen counts of this indictment concern advertisements...remaining counts of the indictments concern checks...(T.55)*

*See, e.g., stipulation that newspaper mailings were made (T. 1123, 1134).

**Actually, the first fourteen counts of the indictment (1-12, 14-15) concerned the advertisements, count 13 having been dismissed on the government's motion (T. 46). This haphazard and inaccurate differentiation between the advertising and check counts shows that there was no real separation among them.

As the distributors testified, there was, again, no differentiation made--each testified to seeing an advertisement and then mailing a check (T. 61, 77-78 [Brodie]; T. 127, 136-37 [Webb]; T. 156, 164 [Flynn]; T. 198, 204 [Connors], T. 495, 506 [Cole]; T. 892, 893 [Suk]; T. 1190, 1191-92 [Metzger]).

Assuming, without conceding, (and only for the purposes of the repugnancy issue*,) that the jury could find, based on the testimony of Taylor and Fisher that appellant Nelson knew of the fraudent misrepresentations, there is still no basis for distinguishing between the newspaper and checks counts; if, however, any distinction can be drawn between these two mailings it would be in appellant Nelson's favor, because Taylor and Fisher's testimony compels the inference that they, (and, possibly, Mackey) without the aid or knowledge of appellant Nelson, arranged for the mailing of these newspaper advertisements (T. 246, 276, 287, 289, 300, 372, 388-90, 572, 582, 646-47, 660-61, 709, 721-22).**

*This concession in no way detracts from the arguments of counsel throughout the trial that the evidence was insufficient to permit the case to go to the jury at all.(See Point I).

**That William Nelson was not aware of the mailing of these advertisements is further supported by the testimony of Alan Nelson (no relation) who ran F & N Advertising. He said he dealt only with Taylor and Fisher (T. 1111-19) and only talked to William Nelson about payment of bills after the mailings had long since taken place (T. 1119, 1136-37). (Footnote continued on next page.)

In his summation, the prosecutor made no distinction between the advertising counts and the check counts but, rather, lumped them together (as had been done throughout the trial) (T. 1532-35); in very revealing language he said:

> "I submit to you that in this case the defendants not only knew that the mails were being used but also it was obviously and reasonable foreseeable to carry out a national fraudulent scheme that the mails would have to be used to get the advertisements out to the various newspapers as well as to get some of those contracts and checks in.
>
> So now that we have covered the mailings in this case, I think we can get on to the critical issues, and they are what the fraudulent scheme was all about and who participated in it and how did they participate in that fraudulent scheme." (1535) (emphasis added)

Lastly, in its charge the trial court merely summarized the mailing counts without distinguishing among them except to say which were advertising and which were check counts (T. 1601-02, 1606-07).

Despite all of the foregoing the jury acquitted appellant Nelson of the check counts but convicted him of

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*(Footnote continued from previous page) It is true that appellant Nelson was involved in placing advertisements in Newsday in April 1972 but that permits no inference of knowledge of mailings because those advertisements were apparently not mailed (since not made the subject of any count in the indictment). (This Court can take judicial notice of the fact that Newsday is located only a few minutes from Mackey's home and the Fulton Street office. Therefore, any involvement of appellant Nelson with placing those ads was probably by phone or in person and permits no inference of knowledge of the mailing of the later ads.)

the advertising counts (T. 1663-1665).*

It is contended that the acquittals on the check counts negatived an element essential to convictions on the advertising counts, i.e., knowledge of and participation in the fraudulent scheme; accordingly, the convictions must be set aside as repugnant to the acquittals.

It is conceded that the general rule is that "Consistency in the verdict is not necessary." DUNN v. UNITED STATES, 284 U.S. 390, 393 (1932). It is contended here, however, that (a) the above rule must be re-examined to determine if it is still valid, and (b) in any event, the verdict must be set aside because repugnant to, not just inconsistent with, the acquittals.

(a) Re-examination of Dunn rule

It should be noted that the strength of the precedential underpinning of Dunn itself is subject to much doubt. To support the proposition that "Consistency in the verdict is not necessary" the majority cited two cases--Lathan v. the Queen and Selvester v. United States. However, as the dissent pointed out, an affirmative inconsistency in

* It should also be noted that the jury took the further irrational action of acquitting co-appellant, Mackey, of the check counts and the first seven advertising counts, but convicting him of the latter eight advertising counts (T.1661-1663).

verdicts "is not a [mere] failure of the jury to pass on all the counts submitted to them as in Selvester . . . and Latham . . ., cited in the opinion here. In this case the jury responded to all the issues, but the findings cannot be reconciled" Dunn v. United States, 284 U.S. 390, 399 (1932) (dissent).

In addition, the reasons behind the Dunn rule, assuming its prior validity, are no longer valid.

In United States v. Maybury, 274 F 2d 899 (2d Cir. 1960) this Court carved out an exception to the Dunn rule where the case was tried to a judge. The court said that Dunn was based on "special considerations relating to the nature and function of the jury". Id at 902.

The court acknowledged that the jury, having developed as an alternative not to trial by the court but to trial by ordeal, was, historically, not required to be any more "rational" that the procedure is replaced. It is:

> "by slowly that the jury was rationalized and regarded as a judicial body." Id at 903.

In other words, the rationalization of the jury has been an on-going process and Dunn merely shows that it had "not yet been deemed wise that this process of rationalization should be carried to this point of requiring consistency in a jury's verdict in a criminal case" Ibid.

We submit that time has come. In recent years, the increasing concern with the rights of criminal defendants has led the Supreme Court to take a closer look at the jury process and to try to remove some of the irrational aspects of the jury decision-making process. See, e.g., Bruton v. United States, 391 U.S. 123, 126-129 (1968). Requiring consistency in jury verdicts would go far toward giving defendants a much-needed protection.

Maybury, supra, suggested another reason for retention of the Dunn rule which might mitigate against the above argument, and that is the requirement of jury unanimity. Maybury, supra, 274 F 2d at 903.

> "ignoring inconsistency in a jury's disposition of the counts of a criminal indictment may thus be deemed a price for securing the unanimous verdict [of the jury as representing the community] that the Sixth Amendment requires . . . Ibid.

With regard to this, it should be noted that, at least in state trials, unanimity is not considered part of the fundamental rights guaranteed by Fourteenth Amendment. Johnson v. Louisiana, 406 U.S. 356 (1972). Therefore, while the federal courts may still require unanimity, the reasons therefore, no longer require ignoring inconsistencies in verdicts.

Furthermore, it has been suggested that Dunn has been eroded by the Supreme Court's decision in Ashe v. Swenson, 397 U.S. 436 (1970) where it was held that one acquitted of the robbery of one of six men at a card game could not be tried for the robbery of another. See United States v. Fox, 433 F 2d 1235, 1239 (D.C. Cir. 1970).

We agree that the basis of the Ashe decision that collateral estoppel is within the Fifth Amendment prohibition against double jeopardy and ought "not to be applied with the hyper technical and arachaic approach of a 19th century pleading book, but with realism and rationality" (397 U.S. at 444) requires this Court to re-examine the continued vitality of the Dunn rule.

It should also be pointed out that exceptions to, and criticism of, the Dunn rule have been increasing. In both Sealfon v. United States , 332 U.S. 575 (1948) and Ashe v. Swenson, supra, the Supreme Court itself "undercut to some extent the dicta in support of Justice Holmes' decision in Dunn". United States v. Visuna, 395 F Supp. 352, 355 (D.C., S.D. Fla. 1975). See, also United States v. Fox, supra. In United States v. Maybury, supra, this Court carved out an exception to Dunn where the trier of fact was a judge. In United States v. Harary, 457 F 2d 471 (2d Cir. 1972) this Court also stated that while inconsistency per se did not

require a reversal, "This hardly leads to the conclusion... that... a judge should give a charge that can only serve the purpose of inducing such verdicts". Id at 479, n. 12.

And, in an increasing number of cases, often with barely a passing wave at Dunn, courts are refusing to sanction inconsistent verdicts. See, e.g., United States v. Bethea, 483 F 2d 1024, 1030 (4th Cir. 1973) ("The rationale of Dunn has no application to this case. That rule, justified as a check on the 'excessive zeal of prosecutors'....should not be converted into an inflexible shield for the overzealous and irrational behavior of a jury.")* By both statute (28 USC §1865 (b) [4]) and caselaw (see e.g., Parker v. Gladden, 385 U.S. 363 [1966]) a verdict may not stand if even a single juror was irrational or incompetent; a fortiori a verdict should not be permitted to stand if based on the irrationality of an entire jury.

The problem of inconsistent verdicts recurs almost daily. See, e.g., United States v. Finklestein, _____F. 2d _____, slip 841 (2d Cir. dec'd 12/1/75). It is submitted that a fresh resolution of this problem is in order.

(b) Repugnant verdicts

While merely inconsistent verdicts may not be improper,

*Cf. the jury's possibly more irrational treatment of co-appellant Mackey.

whether seen as an exception to the Dunn rule or as requiring that that rule be overturned, the type of repugnant verdict returned here may not stand.

Dunn is inapplicable where the acquittal negatives a fact which is necessary for the conviction. Dunn v. United States, supra, 284 U.S. at 406-407 (dissent); United States v. Pappas, 445 F 2d 1194 (3d Cir. 1971); Green v. United States, 426 F 2d 661 (D.C. Cir. 1970); United States V. Travers, 335 F 2d 698, 702 (D.C. Cir. 1964).

The acquittal of counts 16-21 negatives an element essential to conviction on the other counts, i.e., proof beyond a reasonable doubt that appellant Nelson knew of and participated in the fraudulent scheme. No basis in law or fact exists for distinguishing between the newspaper counts and the check counts and they were treated by all parties to this case as merely two complementary aspects of a unitary fraud. Accordingly, the verdict of the jury must be set aside.*

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*The Dunn rule has traditionally been applied to prevent a defendant from obtaining a double benefit where he was not entitled to a single one, i.e., to prevent reversal on a conviction which was justified because of an acquittal which was not. See, e.g., Lambert v. United States, 101 F 2d 960, 963 (5th Cir. 1939). Here, we maintain that it was the acquittal which properly reflected the proof and the conviction which was in error. Therefore, it would be quite proper to set aside the conviction so that the total verdict would represent the evidence in the case.

POINT IV

THE TRIAL COURT'S CHARGE ON "CONSCIOUS AVOIDANCE" WAS IMPROPER, INADEQUATE, AND CONSTITUTES REVERSIBLE ERROR

The indictment charged appellant Nelson with mail fraud under 18 USC §1341. Accordingly, the trial court charged the jury that in order to find appellant Nelson guilty it had to find beyond a reasonable doubt that he knowingly joined a fraudulent scheme and that he knew or reasonably foresaw that the mails would be used to further the scheme:

> A defendant would have to know or have reason to believe the same, for example, that the advertising agency would use the mails to place advertisements in newspapers in various parts of the country (T. 1604).

This portion of the charge was perfectly proper. However, in further defining the dual knowledge that the jury had to find the court also instructed them (over objection [T. 1404]):

> One may not willfully and intentionally remain ignorant of a fact important and material to his conduct in order to escape the consequences of the criminal law.
>
> The defendants could not deliberately close their eyes to what was going on around them in order to permit them to contend that they were deceived by their associates (T. 1608).

Appellant contends that this charge was inapplicable to the facts of this case and should never have been given, that even if it could have been given it was inadequate and

"unbalanced", and that it constitutes reversible error.

It may be assumed, without being conceded, that there was some evidence of conscious avoidance by appellant Nelson of knowledge that some sort of illegal scheme was being engaged in by other members of Mackey Distributions (but see Point I). There was not, however, a single iota of evidence that appellant Nelson knew, or could reasonably have foreseen, that newspaper advertisements would be used or, if used, placed in the mail in furtherance of that scheme.* Al Nelson, of the advertising firm that placed the ads, made two points crystal clear: firstly, he said that ads could be and were placed by telephone or wire (1111); secondly, he said that he only dealt with Taylor and Fisher, and never with appellant Nelson, in the placement of the ads (1112, 1114, 1118, 1119). There was no testimony from any other witness that appellant Nelson participated in the preparation or placement of these advertisements.

This was not a case where the defendant was found in possession of something under such circumstances that he or she remained ignorant of its character at his or her own risk

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*From what the court said in rejecting trial counsel's objection to this charge (T. 1404) it may be presumed that the trial court intended this charge to apply to the check mailing counts, of which appellant Nelson was acquitted. No such distinction was made, however, and the jury was free to use it re: the advertising counts too.

(United States v. BRIGHT, 517 F 2d 584 [2d Cir. 1975][stolen mail]; United States v. JOLY, 493 F 2d 672 [cocaine]; United States v. BRANER, 482 F 2d 117 [2d Cir. 1973] [large denomination Treasury Bills]; United States v. JACOBS, 475 F 2d 270 [2d Cir. 1973] [same]). Nor was this a case where the defendant had to specifically rely on the truthfulness of someone elses' acts (United States v. SARANTOS, 455 F 2d 877 [2d Cir 1972] [attorney filed affidavit based on what client told him]; United States v. ABRAMS, 427 F 2d 86 [2d Cir. 1970] [same]).

There was no bases for giving a charge on whether appellant Nelson consciously avoided learning that advertisements would be placed by mail, and the giving of such a charge was reversible error.

Assuming, without conceding, that same charge on conscious avoidance could have been given, the instructions used here were fatally deficient.

In United States v. BRIGHT, supra, this Court reversed a conviction for possession of stolen mail because the trial court failed to balance the conscious avoidance charge with a statement that if the defendant actually did not have guilty knowledge there had to be an acquittal. This is precisely what happened here.

A charge on "good faith" had been requested i.e., that if appellant Nelson actually believed there was no fraudulent scheme or no use of the mails that there had to be an acquittal.

See Request #9 of Request to Charge of Defendant Nelson. This was denied on the ground that it was "covered in great detail in the Courts' charge and is therefore, denied as duplicative" (T. 1385). This Request, however, had been included precisely because there was no such instruction in the Proposed Charge given counsel during the trial, and there was none given during the actual charge.

In sum, the court gave a conscious avoidance charge without balancing it by telling the jury that if appellant Nelson actually did not have guilty knowledge they had to acquit. This resulted in the jury "getting from the defendant's point of view only the most damning part of this kind of charge without the other balancing factor". United States v. BRIGHT, supra, 517 F 2d at 588.* Theremust be a reversal and a new trial.

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*Since counsel had objected to the giving of the charge at all, and had requested a "good faith" charge, which had been denied, the absence of an exception, in haec verba, to the charge as given may in no way be considered a waiver (F.R.C.P. 51). In any event, the giving of a defective charge on knowledge, especially where it was such a critical issue, is "plain error". United States v. Fields, 466 F 2d 119, 121 (2d Cir. 1972).

POINT I

THE REFUSAL OF THE LOWER COURT TO PERMIT THE PRESENTATION OF THE DEFENSE OF "GOOD FAITH" WAS REVERSIBLE ERROR

In his opening statment, trial counsel for appellant Nelson promised the jury that they would learn the details of how appellant Nelson and co-appellant Mackey made a complaint to the Nassau County District Attorney's office concerning Taylor and Fisher, and that this would show that they (Nelson and Mackey) had been themselves defrauded (T. 59). When the matter came up during the trial and counsel indicated that they would have a member of the District Attorney's office testify to his conversations with appellant Nelson and co-appellant Mackey, the trial court specifically ruled that the evidence was admissible on "state of mind" and had "probative force showing good faith" (T. 926)*. Inexplicably, however, the court later reversed itself and would only permit the introduction of a stipulation that a complaint had been made; the substance and details were excluded (T. 1260).** Since appellant Nelson's entire defense was based on a claim of good faith and since the details of a complaint against

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*The Court was asked "Whether their conversations would be admissible with respect to their defense" and replied they would. Ibid. This shows that it was the substance of the complaint, not merely that it had been made, that was deemed probative of good faith.

**Defendants R-the proffered complaints, are reproduced in the Appendix D.

Taylor and Fisher would have "probative force showing good faith".

Not only was the evidence of critical importance respecting the defense of good faith for conduct preceding December 1, per se, but also to rebut contentions that post December 1 statements were honest explanations rather than, as the Government continuously argued in its closing statement, calculated to continue the fraud. The crucial nature of this interim was recognized by the Trial Court, when, over objection, he permitted testimony regarding post December 1 statements inimical to the defense as reflecting "state of mind".* The refusal of the trial court to admit this testimony was reversible error.**

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*The following testimony and colloquy occurred upon the direct examination of Edith Ciro: (at p. 789, ff)

Q. Now, did there come a time when you heard the name Neltay Corporation?
A. Yes.
Q. When did you first hear of Neltay Corporation?
A. That again was in December, sometime. I would say in the beginning of September or the end---(789)
Q. Which month, please?
A. It was in December. I'm not positive when in December.
Q. Who told you about the Neltay Corporation?
Mr. McCarthy: May we have a side bar?

* * * * *

(Side bar discussion between Court and counsel as follows)
Mr. McCarthy: Judge, at this time I would move to strike any testimony and object to any testimony with respect to Neltay and to any conversation that occurred post-December 1
The Court: Between her and who?
Mr. McCarthy: Anyone regarding Neltay except as to alleged admissions of Mr. Nelson. But, with regard to Neltay, that's (790) beyond the scope of any proof--
Mr. Friedman: There will be testimony that there were sales made after December 1st. There will be testimony that the funds from Mackey went into Neltay and the indictment alleges--
The Court: I'll allow that in.
Mr. McCarthy: I submit the conspiracy ended December 1st.

Footnotes continued on following page.

The general rule, of course, is that a trial court's rulings on the admissibility of evidence are a matter of discretion and will not be reversed in the absence of an abuse thereof. See, e.g., United States v. KAHN, 472 F 2d 272 (2d Cir. 1973). However, such discretion must be exercised with an awareness of the even more basic rules "that when evidence has any substantial logical bearing on the issue, it is best to admit it...". United States v. GRAYSON, 166 F 2d 863, 870 (2d Cir. 1948) (L. Hand, J.). See, also ALTOM v. United States, 454 F 2d 289, 296 (7th Cir. 1972)

*Footnote continued from previous page:

The Court: He is not charging a conspiracy. It's evidence of a prior fraud if they commit a continuing fraud. Their state of mind is critical here. I'm going to permit it.

Taylor got out on December 1st, but the others were still in, according to her testimony. Mackey was bringing in his accountant and Nelson was still around--

Mr. McCarthy: I submit that indicates that rather than a conspiracy, it is an attempt to avert a conspiracy.

Mr. Wolf: They brought in an auditor at that time.

The Court: You can aruge it. I think it is good evidence for the defendants, but I think it is arguable that they were continuing the conspiracy and (791) continuing in control.

Overruled. (emphasis added) (792)

**This error was compounded by the refusal of the trial judge to charge the jury on the issue of "good faith". See Point IV .

("[A]broad rule of admissibility is favored in the federal courts...") Furthermore, if "[e]vidence need not prove the Government's case before it can be introduced" (United States v. Fisher, 455 F 2d 1101, 1103 [2d Cir. 1972]), neither need it prove the defendant's defense: "Although the trial judge has broad discretion when ruling on....evidence it is imperative that on any given issue the same standared by applied to both parties". United States v. PARKER, 447 F 2d 826, 832 (7th Cir. 197[illegible])(See footnote on page 52).

Appellant Nelson's defense was to be that he was unaware that Taylor or Fisher (or anyone else) was engaged in any fraudulent practice, and that he had a good faith belief in the written and oral sales presentations that were made. A close examination of the prosecution's testimony demonstrates that, at best, it was razor-thin (see Point I); accordingly, the presentation of a strong defense of good faith could have convinced the jury to acquit. The trial court's ruling prevented this.

In United States v. GRAYSON, supra, the defendant sought to introduce certain documents ("Sales Reports") to show that certain representations he had made were reasonable and in good faith. This court held the documents were probative and did not tend to confuse or divert the jury and reversed because the lower court's exclusion of these documents prevented the development of the good faith defense.

Similarly, in HOLT v. United States, 342 F 2d 163 (5th Cir. 1965) the refusal of the trial court to permit the defendant to present evidence on the defense of mistaken identity was held reversible error with the following observation: "[W]here the proffered evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility". Id at 166.* See, also, United States v. Parker, supra, (reversible error to exclude evidence of appellant's reputation, though issue was collateral).

United States v. KAHN, supra, is not to the contrary. Although this Court upheld the exclusion of some bits of evidence offered on an extortion defense, the Court did so because "appellants fully presented this defense to the jury below" and the trial court's charge fairly and completely presented the extortion defense to the jury", 472 F 2d at 277, 279. By adverse comparison, no evidence other than the cold stipulation was before the jury** and

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* It was not and could not be contended that the testimony proffered here would prejudice, divert or confuse the jury.

**It is true that there were two other sources from which this testimony could have come, those were appellant Nelson and co-appellant Mackey. However, those individuals chose not to testify and they may not be faulted for having done so. Furthermore, having rules that the Assistant District Attorney could not testify on this matter, the trial judge would similarly prohibit appellant Nelson or co-appellant Mackey from doing so. It is also true that questions were put to some of the witnesses as to whether they knew about this complaint. However, as the court told the jury, questions are not evidence and, in any case, their responses were uniformly negative.

the "good faith defense" charge was refused by the trial court.

No doubt the proseuction will attempt to argue "harmless error", but that attempt ought to be rejected. The evidence of guilty knowledge was thin. The reading of the brief, formal stipulation to the jury could not substitute for the jury's hearing of the details of the complaint, details which would give the complaint the ring of truth.* "The excluded evidence was vital to his defense, and might well have tipped the balance." Holt v. United States, supra, 342 F 2d at 167.

There must be a reversal and a new trial.

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*This was particularly important because the prosecutor, in summation, called the making of the complaint a "snow job" (T. 1573-1586).

POINT VI

PURSUANT TO RULE 17 (i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT HEREBY INCORPORATES BY REFERENCE THE ARGUMENTS CONTAINED WITHIN CO-APPELLANT'S BRIEF.

CONCLUSION

FOR THE FOREGOING REASONS APPELLANT'S CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR, ALTERNATIVELY, A NEW TRIAL GRANTED.

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AFFIDAVIT OF SERVICE

CARMELA CARFORA, being duly sworn, deposes and says: deponent is not a party to the action and is over 18 years of age and resides at 4 Ruth Dr. Hicksville, New York

On April 26, 1976, deponent served the within brief and appendix upon David Trager, Esq., the attorney for the appellee in this action by depositing a true dopy of the same enclosed in a post-paid properly addressed wrapper in a official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me on
the 29th day of April, 1976

Carmela Carfora
Carmela Carfora

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